



July 13, 2001

Ms. Julie Reagan Watson
Assistant General Counsel
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2001-3027

Dear Ms. Watson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149420.

The Texas Department of Human Services (the "department") received a written request for the "statement of deficiency" reports regarding Kingwood Village Estates. The requestor specifies that she is seeking two such reports dated March 30, 2001 and April 11, 2001.

You state that the department has released some responsive information to the requestor.¹ You contend, however, that other responsive documents held by the department are excepted from required public disclosure pursuant to section 552.101 of the Government Code.

You contend that the documents you submitted for our review are made confidential under section 142.009(d) of the Health and Safety Code and thus must be withheld from the public

¹We assume the released records would include any responsive HCFA 2567 forms that summarize the investigations. See 42 C.F.R. §§ 401.126, .133 (statements of deficiencies and plans of correction reports prepared for purposes of Medicare or Medicaid complaint investigation survey must be released in their entirety provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) provider being evaluated had reasonable opportunity to review report and to offer comments).

pursuant to section 552.101 of the Government Code.² Section 142.009(c) of the Health and Safety Code authorizes the department to conduct investigations of complaints regarding the provision of home health, hospice, or personal assistance services. Section 142.009(d) provides as follows:

The reports, records, and working papers used or developed in an investigation made under [section 142.009 of the Health and Safety Code] are confidential and may not be released or made public except:

- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or
- (5) *on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency.* [Emphasis added.]

The records you submitted to our office as Exhibit C clearly constitute “reports, records, and working papers used or developed in an investigation” under section 142.009(c) of the Health and Safety Code. Furthermore, we have no reason to believe that any of the exceptions to confidentiality in section 142.009(d) apply to these records. We therefore conclude that the department must withhold Exhibit C from the requestor pursuant to section 552.101 of the Government Code.

On the other hand, you have also submitted to this office as Exhibit D two state forms titled “Statement of Licensing Violations and Plan of Correction” contemplated by section 142.009(d)(5) of the Health and Safety Code. Some of the information contained in Exhibit D is made confidential under the Texas Medical Practice Act (the “MPA”), title 3, subtitle B of the Occupations Code. *See* Open Records Decision No. 598 (1991). Section 159.002(b) of the MPA provides the following:

- (b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

²Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.”

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

You indicate that the information you have highlighted in the state forms was directly derived from records governed by section 159.002(b). We agree that to the extent that the information contained in the state forms was directly derived from medical records, such information may be released only in accordance with the MPA. The remaining portions of the state forms must be released to the requestor in accordance with section 142.009(d)(5) of the Health and Safety Code.

In summary, the department must withhold pursuant to section 142.009 of the Health and Safety Code Exhibit C in its entirety. The department must also withhold pursuant to section 159.002 of the Occupations Code all information contained in the state forms that was directly derived from medical records. The remaining information contained in the state forms must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/RWP/seg

Ref: ID# 149420

Enc. Submitted documents

c: Ms. Denise Cianiotti
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(w/o enclosures)